

Barbara Ettlinger
 Assistant Regional Counsel, RC-3-4
 United States Environmental Protection Agency, Region IX
 75 Hawthorne Street
 San Francisco, California 94105
 (415) 744-1383

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
 REGION IX

In the matter of:)
 VAN WATERS & ROGERS INC.,)
 2256 Junction Avenue)
 San Jose, California)
 EPA ID # CAD010925576)
 Respondent.)

ADMINISTRATIVE CONSENT
 ORDER

Proceeding Under Section 122(h)(1))
 of the Comprehensive Environmental)
 Response, Compensation and Liability)
 Act of 1980 (42 U.S.C. §9622(h)(1)))
 as amended by the Superfund)
 Amendments and Reauthorization)
 Act of 1986)

CERCLA

DOCKET NO. 92-28

This Order is issued by the United States Environmental Protection Agency ("EPA") and is agreed to by Van Waters & Rogers Inc. ("Respondent"). The purpose of this Order is for EPA to recover response costs incurred and response costs to be incurred by the United States at or in connection with the Van Waters & Rogers Superfund Site ("Site") in San Jose, California, and to resolve the liability of the Respondent for such response costs.

EPA is authorized to enter into this Order pursuant to the authority vested in the Administrator of the EPA by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 ("CERCLA"), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D (Sept. 13, 1987), and redelegated to the Director, Hazardous Waste Management Division, EPA Region IX.

WHEREAS, EPA alleges that hazardous substances as defined by Section 101(14) of CERCLA, 42 U.S.C. section 9601(14), are present at the Site and that such hazardous substances have been or are threatened to be released into the environment from the Site;

WHEREAS, EPA alleges that the Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. section 9601(9);

WHEREAS, EPA alleges that such releases or threatened releases required response action to be undertaken at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. section 9604, and will require further response action to be undertaken in the future;

WHEREAS, EPA alleges that in performing this response action, it has incurred response costs at or in connection with the Site totalling \$ 355,695.25, which it believes includes substantially all of its costs as of July 31, 1991 (except for State costs, which were as of June 30, 1991) and that further response costs will be incurred in the future;

WHEREAS, EPA alleges that the Respondent is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. section 9607(a), and is liable for response costs incurred and to be incurred at or in connection with the Site;

WHEREAS, the Regional Administrator of EPA Region IX has determined that the total response costs incurred by the United States to date at or in connection with the Site do not exceed \$500,000, excluding interest, and that, based upon information currently available to EPA, total United States response costs at or in connection with the Site are not anticipated to exceed \$500,000, excluding interest, in the future; and

WHEREAS, on July 2, 1992, Respondent submitted check #70351472 in the amount of \$ 150,000.00 as a partial payment for the amount demanded herein;

WHEREAS, EPA and the Respondent desire to settle certain claims arising from the Respondent's alleged involvement with the Site without litigation and without the admission or adjudication of any issue of fact or law;

NOW, THEREFORE, in consideration of the promises herein, and intending to be legally bound hereby, it is ordered and agreed as follows:

1. This Order shall be binding upon EPA and shall be binding upon the Respondent and its successors and assigns. Each signatory to this Order represents that he or she is fully authorized to enter into the terms and conditions of this Order

and to bind legally the party represented by him or her. The Respondent agrees to undertake all actions required by this Order. The Respondent consents to the issuance of this Order and will not contest EPA's authority to enter into this Order or to implement or enforce its terms.

2. In addition to the partial payment already made, Respondent agrees to pay to the Hazardous Substance Superfund \$ 150,000.00 in three (3) installments, as follows. The first installment of \$ 50,000 shall be paid within ten (10) days of the effective date of this Order, the second installment of \$ 50,000 shall be paid on or before January 1, 1993, and the third installment of \$50,000 shall be paid on or before May 1, 1993. Interest on the remaining balance shall begin to accrue ten (10) days after the effective date of this Order and shall be paid at the rate established in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). Respondent shall have the right at any time to prepay the outstanding balance owed under this Section without penalty.

In the event Respondent fails to make timely payment of any installment, EPA shall have the immediate right, after fifteen (15) days written notice to Respondent sent by certified mail, return receipt requested, to declare due and owing the entire unpaid balance, and to enter judgment in that amount, provided Respondent fails to cure the default within (15) days after the mailing of said notice. The remedy contained in this paragraph shall be in addition to any remedy available to EPA under law.

3. The Respondent's payment shall be made by certified or cashier's check made payable to "EPA-Hazardous Substance Superfund." The check shall reference the name and address of the Respondent, the site name and identification number, and the EPA docket number for this action and shall be sent by the Respondent to:

EPA Region IX
ATTN: Superfund Accounting
P.O. Box 360863M
Pittsburgh, PA 15251

4. The Respondent shall simultaneously send a copy of its check to:

James C. Hanson
Mail Code H-6-3
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

5. In addition to any other remedies or sanctions available to EPA, any Respondent who fails or refuses to comply with any term or condition of this Order shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3), and to civil penalties pursuant to Sections 122(1) and 109 of CERCLA, 42 U.S.C. §§ 9622(1) and 9609.

6. Respondent agrees to pay EPA's future response costs incurred at or in connection with the Site, including response costs incurred from and after August 1, 1991 (or, in the case of State costs, response costs incurred from and after July 1, 1991). EPA shall provide to Respondent a detailed summary of all expenses annually and shall permit Respondent to review and copy all receipts, invoices and other documents evidencing EPA expenditures (subject to redactions of confidential business information and other information exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a). Respondent reserves the right to demonstrate, and has the burden of demonstrating, that EPA's cost summary contains accounting errors or that EPA's costs are inconsistent with the National Contingency Plan. No reimbursement of a particular charge shall be required if EPA cannot produce any documentation evidencing that charge. The Respondent shall reimburse EPA for all undisputed response costs within forty-five (45) days from receipt of EPA's annual cost summary, in accordance with the procedures set forth in Sections 3 and 4 of this Order. Any disputed costs shall be paid by Respondent into an escrow account while a dispute is undergoing resolution in accordance with Section 13 of this Order.

7. Subject to Section 9 of this Order, upon payment of the full amount specified in Section 2 of this Order, EPA agrees that the Respondent shall have resolved any and all civil liability to EPA under Section 107(a) of CERCLA, 42 U.S.C. section 9607(a), for reimbursement of EPA response costs incurred at or in connection with the Site as of July 31, 1991 (or, in the case of State costs, response costs incurred as of June 30, 1991). The Respondent shall also have resolved any and all civil liability to EPA under Section 107(a) of CERCLA for reimbursement of future response costs paid by the Respondent under Section 6 above.

8. A cost shall be deemed to have been "incurred" for purposes of Sections 6 and 7 as of the date it is paid by EPA, or, if applicable, as of the date it is paid by the agency or entity administering CERCLA funds granted by EPA. If a cost was paid on or prior to July 31, 1991 (or, in the case of State costs, on or prior to June 30, 1991), but was not yet recorded against the relevant site-specific account number in EPA's accounting system, or, if applicable, in the grantee agency's or entity's accounting system, the cost shall not be considered to have been incurred as of the July 31, 1991 (or June 30, 1991, as the case may be) cutoff date set forth in Sections 6 and 7, and

shall be deemed to be a "future response cost" which Respondent shall reimburse in accordance with Section 6. Notwithstanding anything to the contrary in this Order, the charge totalling \$12,350.86 for work performed by Planning Research Corporation prior to the aforementioned dates shall be considered a "future response cost" for all purposes under this Order, and interest shall begin to accrue on such charge on the date of EPA's first annual cost summary for future response costs. Respondent agrees to pay the aforementioned charge of \$12,350.86 without the production of additional backup documentation by EPA, and agrees not to challenge the appropriateness of said charge.

9. Nothing in this Order is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against the Respondent for:

a) any liability as a result of failure to make the payments required by Sections 2 and 6 of this Order or other failure to comply with terms of this Order; or

b) any liability not expressly included in Section 7 above, including, without limitation any liability for damages for injury to or loss or destruction of natural resources.

Respondent reserves all rights it may have to oppose and defend against such claims and actions and to assert any and all claims, crossclaims and counterclaims it may have against EPA and/or any person or government agency except as described in Section 11 below.

10. Nothing in this Order is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against any person, firm, corporation or other entity not a signatory to this Order.

11. The Respondent agrees not to assert any claims or causes of action against the United States or the Hazardous Substance Superfund arising out of response activities undertaken at the Site, or to seek any other costs, damages, or attorney's fees from the United States, its agencies, employees or contractors arising out of response activities undertaken at the Site. However, Respondent reserves, and this Order is without prejudice to, actions against EPA based on negligent actions taken directly by EPA (not including oversight or approval of Respondent's plans or activities) that are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

12. If EPA determines at any time that costs in excess of the amount compromised herein were calculated improperly or otherwise misallocated, Respondent shall be given a credit for the miscalculated amount to be applied against future cost billings. Any disputes arising under this Section shall be resolved in accordance with Section 13 of this Order.

13. (a) Any dispute concerning the United States' future response costs shall be resolved in the following manner. Within thirty (30) days from receipt of EPA's annual cost summary, Respondent shall notify the EPA program contact listed in Section 4 of its objection to EPA's costs. Respondent's objections shall be made in writing and shall define the dispute, state the basis of Respondent's objections, and be sent certified mail, return receipt requested. All costs not disputed shall be paid pursuant to Section 6 of this Order. Disputed costs shall be paid into escrow as described in Section 6. EPA and the Respondent shall have thirty (30) days from the date of EPA's receipt of Respondent's objections to reach agreement on the disputed costs. EPA may extend this period as needed to provide substantiation of its costs to Respondent, provided however, that if EPA does not provide such substantiation within one hundred twenty days (120) of receipt of Respondent's objections, Respondent may temporarily remove its funds from escrow. If an agreement is reached, Respondent shall authorize release of the agreed upon amount out of the escrow account within seven (7) days after the date of such agreement, or, if said funds are not at that time in escrow, shall pay EPA within said seven (7) day period.

(b) If an agreement is not reached within said time period including extensions, Respondent may request a determination by EPA's Hazardous Waste Management Division Director. The Hazardous Waste Management Division Director's determination shall constitute the final decision. Respondent shall authorize release of the costs owed out of the escrow account (or, if not in escrow, shall pay EPA) pursuant to the decision of the Hazardous Waste Management Division Director, regardless of whether Respondent agrees with the decision, within seven (7) days after receipt of said decision. Respondent's payment shall include interest on the amount due, calculated in accordance with Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). Respondent shall not, by reason of this Order, have any right to judicial review not otherwise provided under law.

(c) If Respondent fails to make payment when due under this Section, EPA reserves the right to seek statutory penalties and/or any other appropriate relief.

14. The parties have agreed to this Order to avoid unnecessary conflict or litigation. By entering into this Order or by taking any action in accordance with it, Respondent does not admit any findings, conclusions of law, determinations, or any of the allegations contained in this Order, nor does Respondent admit liability for any purpose or admit any issues of law or fact or other responsibility for the alleged release or threat of release of any hazardous substance into the environment. The participation of Respondent in this Order shall not be admissible against Respondent in any judicial or administrative proceeding, except for an action by EPA to enforce the terms of this Order or actions to which EPA is a party which alleges injury based, in whole or in part, on acts or omissions of the Respondent in connection with performance of this Order. Neither the terms of this Order, including any allegation, finding, conclusion, or determination set forth herein, nor the active performance hereunder, shall be used against Respondent as a collateral estoppel in any other proceeding with EPA.

15. With regard to claims for contribution against the Respondent for matters addressed in this Order, the parties hereto agree that the Respondent is entitled, as of the effective date of this Order, to such protection from contribution actions or claims as is provided in Section 122(h)(4) of CERCLA.

16. Respondent's obligations to EPA under this Order shall terminate and be deemed satisfied upon Respondent's receipt of written notice from EPA that Respondent has demonstrated to the satisfaction of EPA that all the terms of the Order have been completed. Respondent may petition EPA in writing for written termination. If EPA does not respond to Respondent's request within thirty (30) days after receipt of Respondent's letter, Respondent may invoke the dispute resolution procedures set forth in Section 13 of this Order.

17. This Order shall be subject to a thirty (30) day public comment period pursuant to Section 122(i) of CERCLA. In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Order if comments received disclose facts or considerations which indicate that this Order is inappropriate, improper or inadequate.

18. The effective date of this Order shall be the date upon which EPA issues written notice to the Respondent that the public comment period pursuant to Section 13 of this Order has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Order.

IT IS SO AGREED:

Van Waters & Rogers Inc.

By: James D. Flecker 8.3-92
Senior Vice President Date

The above being agreed and consented to, IT IS SO ORDERED
this 28th day of September, 1992.

U.S. Environmental Protection Agency

By: Jeff Zelikson
Jeff Zelikson, Director
Hazardous Waste Management Division
Region IX